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SC Court of Appeals

EXHIBIT D

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Anesthesiology Professionals of Columbia,
LLC,

C/A No. 2019-CP-40-04452

Petitioner,

**PETITIONER'S PROPOSED
ORDER**

v.

Lifepoint Health d/b/a Providence Health and
Providence Hospital LLC,

Respondent.

This matter is before the Court upon Anesthesiology Professionals of Columbia, LLC's ("APC" or "Petitioner") Petition pursuant to S.C. Code Ann. § 15-48-130(a) for an order vacating the Final Determination and Order (the "Award") issued by Arbitrator Richard D. Sanders on May 15, 2019. Having reviewed the parties' briefings, as well as considered the arguments presented by counsel at the hearing on this matter on June 22, 2021, the Court hereby **GRANTS** APC's Petition for the reasons set forth below.

FACTUAL FINDINGS

A. THE AGREEMENT & DEMAND FOR ARBITRATION

1. APC and Respondent Lifepoint Hospital d/b/a/ Providence Health and Providence Hospital LLC (the "Hospital") entered into the Agreement effective April 15, 2014, to provide in-patient anesthesiology services to surgical patients at the Hospital. *See* (R. 271:3-11); (R. 118-160); (R. 30 ¶¶ 8-9).

2. Section 7.2 of the Agreement provided that the Hospital could terminate the Agreement without cause during the initial five (5) year term (the "Initial Term").

3. Section 7.2 of the Agreement provides:

7.2 Termination Without Cause. Either party may terminate this Agreement for any or no reason, and without penalty, upon the provision of one hundred eighty (180) days prior written notice to the other party. In the event Hospital terminates this Agreement pursuant to this Section 7.2 without cause and with such termination to take effect prior to the expiration of the Initial Term, Hospital agrees that it shall continue to compensate [APC], in accordance with the terms of Section 4.4 and Exhibit E herein, for a period of one hundred eighty (180) days.

(R. 117-160).

4. In March 2017, the Hospital provided APC with notice it was terminating the Agreement without cause. *See (R. 286:9-287:18); (R. 248-249).*

5. The parties agreed that APC would continue to provide services through September 30, 2017 (the “Termination Date”). *See (R. 250-251).*

6. Following the Termination Date, a dispute arose between the parties regarding APC’s demand for 180 days of post-termination compensation (the “Post-Termination Payments”) provided under Section 7.2 of the Agreement.

7. Pursuant to Article 23 of the Agreement entitled “Dispute Resolution”, any controversy or claim arising out of or relating to the Agreement shall be resolved by binding arbitration conducted by a single arbitrator in accordance with the American Health Lawyers Association (“AHLA”) Alternative Dispute Resolution Rules of Procedure for Arbitration.

8. Unable to resolve the dispute over the Post-Termination Payments, APC filed a demand for arbitration with the AHLA on January 25, 2018. **(R. 22-78).**

9. The Hospital filed its Answer and Counterclaim to the Demand on April 30, 2018, **(R. 79-90)**, asserting as an affirmative defense that payment of the Post-Termination Payments to APC would not be commercially reasonable or fair market value because the APC physicians were not providing services **(R. 82 at 8).**

10. Thereafter, the Arbitrator was appointed by the American Health Lawyers Association (AHLA) and the parties proceeded with discovery.

B. DISCOVERY & PRE-HEARING DISCLOSURES

11. Given the Hospital's assertion that the Post-Termination Payments to APC would not be commercially reasonable or fair market value, APC requested all evidence the Hospital had to support this position in four separate interrogatories. *See* (R. 332-334, INT Nos. 4, 5, 6, 7, & 8).

12. In response to each interrogatory concerning this affirmative defense, the Hospital answered,

ANSWER: Respondent is not claiming that the Agreement runs afoul of the Stark law.
Id.

13. Similarly, in response to requests for production of documents supporting this Stark-based affirmative defense, the Hospital claimed attorney-client privilege and that the work product doctrine precluded disclosure of the responsive documents but confirmed that,

RESPONSE: PYA prepared a summary appraisal report of fair market value compensation and commercial reasonableness related to the Agreement (the "appraisal (R. 337, RFP No. 9).

14. Also, in response to APC's request for an identification of all witnesses with knowledge of the facts in the case and a summary of their testimony, the Hospital did not identify a single witness that had knowledge related to this affirmative defense. (R. 329-332, INT Nos. 1 & 3).

15. Nor did the Hospital identify an expert to testify on these matters in its discovery responses. **(R. 334, INT No. 9; R. 338, RFP Nos. 10, 11, & 12)** (referring to confidential PYA appraisal report).

16. Additionally, APC's counsel raised the issue of this Stark-related affirmative defense during a pre-trial conference with the Arbitrator. Specifically, APC's counsel inquired whether the Hospital intended to present evidence on commercial reasonableness or fair market value in support of its affirmative defense at the hearing. The Hospital's counsel indicated such testimony would not be presented and that the Hospital was not contesting the Agreement under the Stark law.

17. Finally, in its prehearing witness disclosure, the Hospital did not identify an expert witness nor a lay witness that had knowledge and intended to testify on commercial reasonableness and fair market value. *See* **(R. 258-260)**.

C. THE ARBITRATION HEARING

18. The hearing on this matter took place on March 12, 2019, and March 28, 2019.

19. At the hearing, APC presented testimony from individuals involved in the negotiation of the Agreement in support of APC's interpretation of Section 7.2 of the Agreement. These witnesses included Mr. Martin, the COO of the Hospital when the Agreement was executed, as well as the APC physicians.

20. In its case, the Hospital elicited testimony from Mr. Bernard and Mr. Doyle. Both gentlemen are currently employed as executives with the Hospital; however, neither were associated with the Hospital at the time the Agreement was negotiated or executed and, thus,

necessarily did not have first-hand knowledge related to the same. **(R. 305:19-21; 306:6-10; 312:13-16; 323:9-13; 324:14-20).**

21. Over the objection of APC's counsel, the Arbitrator permitted Mr. Bernard and Mr. Doyle to testify that it would not be commercially reasonable, nor fair market value, for the Hospital to comply with the early termination provision of Section 7.2 of the Agreement and the severance payments due thereunder. **(R. 310:6-311:1; 321:25-322:15).**

22. Neither Mr. Bernard nor Mr. Doyle, who are hospital executives, are experts in making such judgments and each admitted that hospitals rely on independent third-party experts to make such determinations on their behalf – not their executives. **(R. 312:17-23; 327:2-328:1).**

D. THE AWARD

23. Despite these admitted gaps in knowledge in such testimony, and their lack of expertise in making such determinations, the Arbitrator relied on such testimony and his independent experience to find the Agreement's Post-Termination payment requirement was not commercially reasonable and therefore violated the Stark law. *See* **(R. 17, 20)**. Moreover, such conclusion was reached despite the repeated representations by the Hospital that it was not contesting APC's claim based on the Stark law.

CONCLUSIONS OF LAW

24. S.C. Code Ann. § 15-48-130(a) provides that upon application by a party, the Court shall vacate an award where the misconduct of an arbitrator prejudices the rights of any party or where an arbitrator exceeds his power.

25. It is clear from the Record in this case that the Arbitrator exceeded the scope of his authority by ruling on an issue that was not before him – whether payment of the Post-Termination

Payments pursuant to Section 7.2 of the Agreement was commercially reasonable. Pre-trial discovery and disclosures make evident that neither party submitted this issue to the Arbitrator; therefore, the Arbitrator patently exceeded the scope of his authority when ruling on the same. See *Pittman Mtg. Co. v. Edwards*, 327 S.C. 72, 77 (1997) (vacating portion of arbitration award that exceeded issues presented and relief sought by parties).

26. Moreover, in ruling on an issue that was not before him, the Arbitrator prejudiced the rights of APC by permitting testimony on commercial reasonableness and fair market value from Hospital witnesses when the Hospital made repeated representations during discovery it was not challenging such Stark-related issues and did not identify an expert or lay witness in its pre-trial disclosures that it expected to testify to these matters.

27. Without notice that such issues would be considered by the Arbitrator, APC was not prepared to refute such testimony. Nor was it given an opportunity to explore the opinions presented by the Hospital on these issues during discovery or retain its own expert to refute the same.

28. Such prejudice was only further compounded by the Arbitrator's reliance on "his expertise in healthcare law" (**R. 20-21**) when the procedural rules he was bound by under the AHLA require "the Final Award [] be based on evidence presented at [the] hearing." Rule 7.2, AHLA.

29. Based on the Arbitrator's failure to circumscribe the Award to the issue before him, and the unambiguous prejudice to APC resulting therefrom, the Court vacates the Award and remands the matter back to arbitration for a rehearing before a different AHLA arbitrator. See S.C. Code Ann. § 15-48-130(c).

30. On remand, the arbitrator's inquiry shall focus solely on the issue the parties had an opportunity to conduct discovery on following APC's filing of the Petition – whether interpretation of Section 7.2 of the Agreement entitles APC to Post-Termination Payments.

IT IS SO ORDERED.

THE HONORABLE L. CASEY MANNING
CHIEF ADMINISTRATIVE JUDGE
FIFTH JUDICIAL CIRCUIT

_____, 2021

Columbia, South Carolina



Richland Common Pleas

Case Caption: Anesthesiology Professionals Of Columbia Llc vs Lifepoint Health ,
defendant, et al
Case Number: 2019CP4004452
Type: Order/Other

So Ordered

s/L. Casey Manning, 2061

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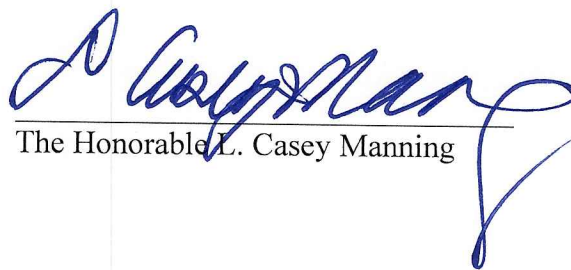
Respondent.

This matter is before the Court upon Respondent Lifepoint Health d/b/a Providence Health and Providence Hospital LLC's ("Providence") motion to reconsider the August 4, 2021 order of this Court ("Order") granting the petition of Anesthesiology Professionals of Columbia, LLC's ("APC") to vacate the Final Determination and Order (the "Award") issued by Arbitrator Richard D. Sanders on May 15, 2019. The arguments set forth by Respondent in its motion were previously considered by the Court and rejected. The motion does not set forth any additional grounds warranting a reversal in the Court's determination that the Award should be vacated. Accordingly, the Court hereby **DENIES** Respondent's Motion to alter or amend its judgment pursuant to Rule 59(e), SCRCP.

Additionally, the Court hereby **GRANTS** Respondent's request pursuant to Rule 60(a), SCRCP, to amend the clerical mistake in the caption of the Order presently on file. The Clerk of Court is hereby instructed to replace the Order on file entitled "Petitioner's Proposed Order" with the document attached hereto as Exhibit A and entitled "Order". The corrected Order shall retain the same filing date as the version originally filed on August 4, 2021.

IT IS SO ORDERED.

Dated: 11-23-2021


The Honorable L. Casey Manning